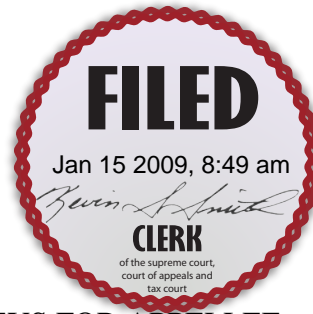


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ADELL SIMMONS,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 27A05-0807-PC-438
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0606-FB-118

January 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Adell Simmons appeals the denial of his petition for post-conviction relief after pleading guilty to class B felony dealing in cocaine and class D felony possession of marijuana. He contends that his counsel was ineffective in failing to investigate or interview a certain eyewitness. We affirm.

On April 5, 2006, Marion Police Detective Ross Allen arranged for an informant to arrange a cocaine purchase from Christine Oakley. Detective Allen accompanied the informant, posing as her nephew. When Oakley reached the rendezvous point, it was still daylight. Oakley had a passenger in the front seat whom Detective Allen described as a “black male in a gray sweatshirt and blue jeans[,]” P-CR Tr. at 40, and whom he later identified via photograph as Simmons. Upon entering the backseat of Oakley’s vehicle, Detective Allen gave Simmons \$150, and Simmons handed him a piece of crack cocaine in return.

On April 7, 2006, Oakley, Simmons, and Gary Brown were riding in Oakley’s vehicle when they were stopped by police. Police found marijuana on the seat next to Simmons, and Simmons admitted that it belonged to him. He was placed under arrest and charged with class D felony possession of marijuana.

On June 15, 2006, the State charged Simmons with class B felony dealing in cocaine. On September 15, 2006, he pled guilty to both charges pursuant to a plea agreement. The trial court sentenced him pursuant to the plea agreement, which provided for concurrent terms of ten years, with four years suspended, for the class B felony and three years, with two years suspended, for the class D felony.

On July 2, 2007, Simmons filed a pro se petition for post-conviction relief. On April 14, 2008, he filed an amended petition by counsel. The post-conviction court held a hearing on April 23, 2008. On June 1, 2008, the post-conviction court issued an order denying Simmons's petition.

Simmons now appeals the denial of his petition. The petitioner in a post-conviction proceeding "has the burden of establishing grounds for relief by a preponderance of the evidence." Ind. Post-Conviction Rule 1(5); *Brown v. State*, 880 N.E.2d 1226, 1229 (Ind. Ct. App. 2008), *trans. denied*. When appealing the denial of a petition for post-conviction relief, the petitioner stands in the position of one appealing a negative judgment. *Brown*, 880 N.E.2d at 1229. Therefore, "[o]n review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court." *Id.* Here, the post-conviction court entered extensive findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* (citation and quotation marks omitted).

Simmons claims that he was denied his constitutional right to effective assistance of counsel. A petitioner must satisfy two components to prevail on his ineffective assistance claim. *Id.* He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is "representation that fell below an objective standard of reasonableness, committing errors so

serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Brown*, 880 N.E.2d at 1230. “[C]ounsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that, “but for counsel’s errors the result of the proceeding would have been different.” *Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id.* “[I]f a petitioner is convicted pursuant to a guilty plea, and later claims that his counsel rendered ineffective assistance because counsel overlooked or impaired a defense, the petitioner must show that a defense was indeed overlooked or impaired and that the defense would have likely changed the outcome of the proceeding.” *Richardson v. State*, 800 N.E.2d 639, 646 (Ind. Ct. App. 2003), *trans. denied* (2004).

Simmons contends that his trial counsel was ineffective in failing to investigate or interview Oakley. The post-conviction court made the following findings regarding Simmons’s guilty plea:

3. At the plea hearing, [Simmons] was advised that by pleading guilty he was waiving and giving up the right to:
 - a. A public and speedy trial by jury;
 - b. the right to confront and cross examine any witnesses brought against him;
 - c. *the right to use subpoena power of the court to require witnesses to appear and testify in his behalf;*
 - d. the right to require the State prove the charges of Dealing in Cocaine as a Class B Felony, and Possession of Marijuana, a Class D Felony beyond a reasonable doubt;
 - e. the right to appeal the entry of a judgment of conviction and sentence.

[Simmons] acknowledged that he was waiving or giving up each of these rights.

-
5. At the hearing on the plea agreement, [Simmons] acknowledged that he was pleading guilty freely and voluntarily and that nobody was forcing or threatening him to enter a plea of guilty against his free will. Moreover, [Simmons] acknowledged that pleading guilty, pursuant to the written plea agreement before the court, was in his best interest.
 6. [Simmons] admitted to the court that he was satisfied with his [counsel] and that he felt [counsel] properly represented him in this matter.
 7. [Simmons], *through his own admissions, established a factual basis* for his plea of guilty to the charge[s]

Appellant's App. at 124-25 (emphases added).

Here, Simmons claims that, had counsel interviewed Oakley, counsel would have discovered that she could provide exculpatory testimony that Simmons was not in her vehicle on the day of the cocaine purchase. We fail to see how such an interview of Oakley would have changed the outcome of the proceeding. First, the subject matter of Oakley's testimony—Simmons's presence or absence—was within Simmons's own personal knowledge. Not only did Simmons know whether he was present, but he also knew that Oakley knew whether he was present. In fact, Simmons testified at the plea hearing that Oakley was the person present with *him* in the vehicle during the cocaine purchase. Pet. Ex. A. When combined with the fact that she was his live-in girlfriend, this indicates that he was aware of her existence and her ability to corroborate his testimony. Because he had firsthand knowledge of this witness, he can neither claim to have been surprised by her ability to provide exculpatory testimony nor blame his counsel for failing to personally discover evidence to which he himself had access throughout.

Moreover, both the trial court and the plea agreement specifically advised Simmons that, by pleading guilty, he was waiving his right to subpoena witnesses to testify on his

behalf. Thus, with full knowledge of whether he, in fact, was the person present with Oakley during the drug purchase and that he could have called her to testify on his behalf, Simmons nonetheless chose to plead guilty. To the extent he argues that he would not have pled guilty had counsel interviewed Oakley and called her to testify, we reiterate that he knew the underlying facts before he chose to enter his plea, including any evidence that might support exoneration. Finally, Detective Allen identified Simmons not only as the person present with Oakley, but also as the person from whom he directly purchased the cocaine. Tr. at 39. Oakley's testimony would not have changed the outcome of the case. Accordingly, we affirm the post-conviction court's denial of Simmons's petition.

Affirmed.

ROBB, J., and BROWN, J., concur.